DOCUMENT RESUME

ED 240 725 EA 016 493

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TITLE Selected Legal Considerations Bearing upon Alternative Salary Plans for Teachers. Revised.
PUB DATE 3 Nov 83
NOTE 18p.; Paper presented at the Annual Meeting of the National Conference of Professors of Educational Administration (August 1983) and revised for the Midwest Conference on Alternative Salary Plans for Teachers (Lincoln, NE, November 3, 1983).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Reports - Research/Technical (143) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Civil Rights; Civil Rights Legislation; Compliance (Legal); *Differentiated Staffs; Elementary Secondary Education; Employment Practices; Incentives; *Legal Problems; Master Teachers; *Merit Pay; Merit Rating; Rewards; *Salaries; *Social Discrimination; *Teacher Employment; Teacher Morale

ABSTRACT

Although employment decisions must be in harmony with existing case laws and statutes, such decisions allow for more flexibility than is sometimes supposed. Increasingly, state legislators and other public officials (including Secretary of Education T. H. Bell and Tennessee Governor Lamar Alexander) are working to establish differentiated pay scales that would reward teachers for high performance. Although the single salary pay scale has the advantage of not being race or sex biased, it offers equal rewards for work of varying degrees of quality. To provide incentives that will attract good teachers and keep them in the profession, many school administrators are now approaching the question of teacher salaries more aggressively. A recent South Carolina court case affirms efforts to improve instructional programs through variations in salary based on testable teaching related competencies. Because of United States civil rights legislation (1866, 1871, and 1964), school district attempts to establish variable pay plans must be able to refute any accusation of discrimination. Three recent court cases in Colorado, Oregon, and North Dakota indicate that the key to such variable pay plans is that they give fair promise of improving instructional quality within the confines of state and federal laws. (JBM)

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Selected Legal Considerations Bearing Upon Alternative Salary Plans for Teachers

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Presented to:
The National Conference of Professors of Educational Administration, August, 1983 and revised for
The Midwest Conference on Alternative Salary Plans for Teachers
Lincoln, NE
November 3, 1983

EA 016 493

Pay Differentiation: Some Views

A major function of school administrators is to select for teaching positions those people with the greatest promise of instructional effectiveness. Typically, there is a range of quality among certificated performers on a given job. The teaching setting should be such an attractive environment that high quality (and short supply) teachers will want to stay and teach, and that others will want to improve. Part of this whole activity rests upon salary, a primary motivator for quality performance, and a control device that might be used by administrators.

Decisions related to employment must be harmonious with existing case laws and statutes; however, there is more flexibility in personnel administration than is sometimes supposed. For example, the Age Discrimination in Employment Act includes school districts, and provides civil rights protections for the 40-70 year age group. If, however, an LEA can show that age is demonstrably related to effective job performance, then age may be used as an occupational qualification and a part of employment decisions. (EEOC v. Elrod 50 USLW 1153, U.S., 1982; and Markham v. Geller 635 F2d 1027, cert denied _ U.S._, 1981).

More specifically, what about variations in pay accomplished by way of subjective evaluations? Higgins was an applicant for an "incentive" position but was passed over for Zimmerman, another teacher in the same school district who had less experience, fewer degrees, and lower evaluations from the building

principals. The West Virginia Supreme Court supported the board in its choice of Zimmerman, who, it was claimed, had a better personality for high school work, more enthusiasm for extracurricular activities, and more job-specific high school teaching experience. The court observed that some performance qualities are not handily quantified, "such as elan, enthusiasm, leadership, and talent." Endorsing the concept of "informed subjective judgment," the court also refused to accept a strictly mechanical type of personnel evaluation and comparison, allowing a place for expert administrative assessment. (See Higgins v. Board 286 SE 2d 682, WVSC, 1982).

Legislators in Tennessee and Florida are among state lawmakers at work attempting to draft a master teacher bill. Testimony of consultants, advocates, and opponents has been heard. Some want to limit the numbers in the category of master teacher; others want the category open enough to accommodate all who meet the criteria that are finally set in place--without any maximum imposed on the qualifiers.

In October 1983, the House Committee on Education and Labor issued a task force report, "Merit Pay Task Force Report." That committee report made statements about cross-occupational pay scales, the comparative proportion of school expenditures going to teacher salaries, and the relatively low encouragement given to talented students evidencing interest in teaching as a career. The committee defined and gave examples of merit pay as apart from a career ladder pay plan. Making thirteen recommendations, the committee put most of the burden on states and school districts, with some federal participation in four areas:

> The federal government should (1) expand the support of summer institutes; (2) create a scholarship program for bright high school graduates; (3) create a fellowship program for talented teachers; (4) support varied programs in research and development focused upon teacher performance.

So, legal impetus for differentiated pay, with top pay to top teachers, can be seen in all three branches of government, and at all levels.

In a January 1983 speech, Secretary of Education T. H. Bell commented upon data indicating that fewer highly qualified women are entering education careers than in 1972. "I think we are past due for a change in the way we compensate teachers," he said as he proposed the identification of master teachers who could earn salaries of $40,000 or more. Responding to his data, the NEA stated that "It's a matter of salaries, pure and simple," but did not endorse his merit pay for high quality proposal. President Reagan has taken up the same theme, declaring that, "If we want to achieve excellence, we must reward it." That comment, delivered on June 14, 1983 in Knoxville, Tennessee, was made while he was in that state to visit with Governor Lamar Alexander, a strong proponent of higher pay for superior teachers. Both government leaders are advocates for differentiated pay to teachers, with high salaries paid for high performance.[1]

Governor Alexander's plan has two major components: identification of personnel and funding to support the plan. An ad hoc panel has been created to develop the criteria by which senior and master teachers can be identified. The governor expects a finished proposal in 1983. The finance component has several aspects, and at one time included a proposal to raise the average teacher salary about $3,400 per year over the next three years. Second, the plan includes an additional $1,000 raise for every tenured teacher. Third, up to 60 per cent of the teachers might be identified as master teachers and they would be eligible for raises of $1,000 to $6,000. Confident that a fair method for identification will emerge, the governor is planning a legislative package for 1984.[2]

Most school administrators accept the generally held organizational principles that there is a connection between salary and worker satisfaction. That is an argument for higher salaries for teachers. In this paper, the

declaration of the NEA, above, is rejected as too simplistic, but a strong correlation between salary level and teacher satisfaction on-the-job is accepted.

Thematically, aligned with Secretary Bell on the value of differentiated compensation--high compensation high performers, and vice versa--there is some need to examine the single salary schedule as a blueprint on how to deliver compensation to teachers.

The single salary schedule is not race or sex biased. That has value. It does show preference for years in position. In an enterprise that is female dominated, the single salary schedule was the device that accomplished parity between sexes, prior to the national drives for civil rights. Such salary schedules are not always evenly implemented, given the fact that thousands of the nation's school districts have such schedules as basic to their pay plan, and some deviations should be expected as a function of that magnitude. Theoretically, they eliminate invidious discrimination on the basis of sex, race, age, national origin, and so on. Their value is grounded in a past history of favoritism and discriminatory contracts imposing many conditions that, today, are not accepted as related to the quality level of instruction and are contrary to civil rights legislation. The general social conditions and the specific employment conditions at the onset of the single salary schedules in the 1940s and 1950s bear scant resemblance to the economic and labor relations conditions and problems of the 1980s. The salary schedule has a conceptual commonality with other occupational pay designs in that it promises more pay for every year on the job, over many years. It does not incorporate any provision for sharply reduced pay as has happened to many workers in the 1980s as the call for their service or product has declined.

Salary schedules are ambiguous, creating some new problems while addressing others. Responsibility levels of assigned instruction are treated

unequally. A second grade teacher in the second year of experience is compensated quite differently from a second grade teacher in the twelfth year of experience. The responsibility of each is the same, and they may even be in adjacent rooms; but, the money for the job performance is quite different. Arguments can be made for increased performance effectiveness related to years of experience and academic advancement, and there is no contention here to the contrary. However, who would seriously argue that the salary difference between groups of nine year and eighteen year experienced teachers could be justified consistently by a performance appraisal which would show a gain worth the added money--whatever the amount it might be? The point is that salary schedules have some weaknesses, some inherent biases with limited relationship between the schedule and quality of teaching performance.

Unlike teaching, some other occupational categories deliver pay to the job, based upon negotiated contracts. A first year worker and a ten year worker may receive identical salaries or wages because it is the job itself that is priced, not the job plus yearly increments. In its own way, the identical salary design is couched in fair play and could be defended as originating from common law notions of equity. Some observers might reasonably argue that a system such as is typical for teachers of the 1980s is really delivering a salary for job continuation, for stick-to-itiveness, or other characteristic that might be worth some compensation, but are not, necessarily, the essence of high quality instruction. In changing economic times, school districts are looking about for ways to use salary dollars to maximize effective performance in classrooms. The salary schedule may be ripe for major revisions.

The National Commission on Excellence in Education paid some attention to the problem of supply and demand, proposing that it should be more difficult

to become a teacher than it is, and that teaching salaries should be raised, to make it a more attractive occupation--one that would bear scrutiny for comparability with other, better-paying occupations. Further, the Commission urged for differentiated pay. "Superior teachers can be rewarded, average ones encouraged, and poor ones either improved or terminated." A career ladder should be designed distinguishing among beginning, experienced, and master teachers, with pay delivered accordingly.[3]

The matter of faculty morale, as it would be affected by any major changes in pay plans, is of vital importance but not treated in this paper.

Incentive Pay

Before examining some purposes and illustrations of incentive pay, a consideration of comparable worth is necessary. The single salary schedule obliterated sex preferences. In a way, it is a good example of acceptance of the theory of comparable worth, on the basis of the sex factor. In its common usage, comparable worth has come to mean interoccupational comparisons. Broadened, it can also mean interoccupational comparisons and comparisons between different teaching assignments, as well; and, it may have limited value in differentiated pay plans for teachers.

Some individuals have sought relief from perceived low pay through the theory of comparable worth. It does not yet have judicial standing, and it has seldom been used by school districts as a rationale for differentiation in pay to teachers. That is, school districts have been content to compare teachers to other teachers, and cross occupational comparisons for teachers--and administrators--produces a mixed bag of results. It depends on who designs the comparison and for what ends. Under the theory of comparable worth, it seems likely that some school administrators who are interested in

finding new ways to deliver compensation to teachers will initiate job evaluation studies, comparing such things as skills, effort, responsibilities, and location across job families rather than staying strictly within identical job titles. The intent of such studies would be the justification of differential teacher pay--more to some and less to some--on the premise that some teachers are more comparable to other occupations than to other teachers. Or, on the promise that some teachers just do not compare well with all other or most other teachers. The practice in schools has been to use identical job titles for delivery of salary; comparable worth is another view, opening substantial new questions. It would call for legal standing created by LEA policy.

Despite some frailties, by its name and by selected characteristics, comparable worth has already become a part of teacher pay patterns in certain limited ways. Consideration of any pay pattern that might provide differentiated pay for teachers doing highly similar tasks must be so formed as to provide a sure denial of accusations of unlawful discrimination. In variable pay formats in schools, some males may be highly paid and some females paid less--for functioning as teachers, which is an identical task; however, the pay difference cannot be awarded on some such characteristic as 'head of household,' a characteristic with a legacy in sexism.

Several studies have been done inquiring into reasons why teachers find their occupation desirable or not. Most of those studies were done during the 1960s and 1970s and tended to downplay the salary-benefit reward as a dominant factor in job satisfaction for teachers. These were also the years of fast growth in schools, when prospective teachers were in short supply and job procurement relatively easy, and when the larger economy provided variety in job selection--an enticement accepted by many ex-teachers who found jobs in

other occupational settings. Those were radically different decades from what can be seen of the teacher labor market for the 1980s. Too, there is a substantial mass of other research in the extended arena of jobs and rewards that tends to show the opposite notion: American workers are inclined to be satisfied with their job as they perceive the financial rewards to be fair and adequate, with good money prospects.

Practically, administrators have found two basic problems in personnel management for which a reasonable remedy is differentiated pay: (1) academic areas of critical supply; (2) schools which by their geographical location are undesirable work settings. Long ago, it was discovered as necessary to modify the single salary schedule for some selected teachers by extending their contract year, by paying for extra duties, or some other enticement--the very minimum to even get any teacher, of any quality level. Now, there may be a need to carry this differentiation further, with contract year and prescribed duties held constant.

Form an administrator's narrowest viewpoint, what is an appropriate salary for a teacher? It is enough to assure that competent people with the necessary academic backgrounds can be hired, that they will be enticed to extend their work period over the years, developing their effectiveness from year to year, with the operational costs kept at minimum. The NCES, in "Projections of Educational Statistics to 1990-91," Volume I, states that teacher salaries will average about $20,000 in 1990, up from $17,246 in 1980, as measured in 1980 dollars. That would give teachers about the same buying power that they had in the early 1970s, before the surplus of trained teachers combined with declining pupil enrollments to depress teacher salaries. Many school administrators are approaching the question of teacher pay more aggressively, introducing variations in pay to fill the staffing needs in their school district, and acknowledging the fact that supply and demand are big parts of their

efforts. There are examples to be found in several school districts across the nation. Some specifics of legality are pertinent.

In NEA v. South Carolina (434 U.S. 1026, 1978) the circuit courts' holding was affirmed, allowing South Carolina to continue to use the National Teacher Examination scores as a licensing and salary setting device. "South Carolina officials were concerned with improving the quality of public school teaching." That court insisted that the state show a "rational relationship to a legitimate employment objective" and the pay disparity between white and black teachers. The state identified its legitimate objective "as providing an incentive for improvement, so that teachers with inadequate knowledge to teach effectively will upgrade their capability." The judiciary accepted the state's goal to upgrade the talent of persons trained as teachers who met only minimum qualification standards by offering pay raises for higher scores on the certification test. Variations in pay based on teaching related competencies is a settled question.

Other examples and ideas could be cited, but it is sufficient here to note that school administrators in quite varied settings have installed and are operating merit pay plans of some sort. Legislators across the nation and other government officials are pointing toward pay plans with comparison components. The plans themselves may be different in details, but the expectation is the same; i.e., improvement in instructional programs can be accomplished through designed variations in compensation to the teachers in classroom settings.

Federal Law and Fair Compensation

Civil rights legislation in the U.S. was first designed to combat racial bias. The federal legislation that came upon the close of the Civil War was

specific to race, and the first such act was the Civil Rights Act of 1866. Little additional legislation in the area of civil rights occurred for nearly a century. The Civil Rights Act of 1964 (P.L. 88-252) was passed on July 2, 1964. It was a statute of eleven parts, with Title VII emerging as the most important for consideration of teacher compensation.

Title I - Voting Rights
II - Injunctive Relief Against Discrimination in Places of Public Accommodation
III - Desegregation of Public Facilities
IV - Desegregation of Public Education
V - Commission on Civil Rights
VI - Nondiscrimination in Federally Assisted Programs
VII - Equal Employment Opportunity
VIII - Registration and Voting Statistics
IX - Intervention and Procedure After Removal in a Civil Rights Case
X - Establishment of Community Relations Service
XI - Miscellaneous[4]

The liability of such governmental units as public schools has been expanded recently, based upon both old and new civil rights legislation. Using that federal legislation, citizens have brought actions against schools, seeking injunctions, reinstatement when dismissed, appointment when not hired, affirmative action to compensate for past discrimination, and the cut-off of federal funds to schools alleged to be in non-compliance with civil rights statutes. Frequently, teachers, and students as well, have sought money damages as well as court orders for violation of their civil rights by school administrators. Variable pay plans must be designed with care, and with attention to the civil rights of teachers.

Long neglected and almost forgotten, the Civil Rights Act of 1871 has emerged as the least restrictive statute under which plaintiffs can claim for violation of civil rights. Section 1983 (42 USCA § 1983) is not confined to any particular class, or group, providing a broad basis for suits in violation of the Constitution and other federal statutes. With such broad coverage, and

with the cumulative federal legislation represented by such legislation as the Equal Pay Act, the Age Discrimination Act, the Rehabilitation Act (and Section 504), and the various employment discrimination acts, it is apparent that any school district attempting to establish a variable pay plan must be prepared to shoulder the burden of proof that may be necessary to refute any accusation of discrimination--on the basis of sex, race, age, handicap, national origin and so on.

Cases

From a rather large number of cases that could be chosen, three have been selected for inclusion here. They harmonize with cases already cited, and they do provide a good picture of current judicial decisions, as well as some direction for school administrators on matters of differentiated pay.

Lemons v. City and County of Denver (1980)
620 F. 2d 228 (cert. denied: 449 U.S. 888)

Description

This was an action for damages and backpay from another female dominated workforce. These nurses were employed by the city. The city's pay plan called for comparisons to be made annually and determinations made about pay, within specific job classifications. Pay parity for city nurses and other nurses in the community was an accomplished goal. The plaintiffs did not want that comparison, asserting that all nurses in the community were underpaid and their suggested remedy was to compare nurses with non-nursing occupations of their selection.

Question and Answer

Can these plaintiffs get relief under the Civil Rights Act, the Equal Pay Act, or the Constitution? USCA: No.

County of Washington, OR v. Gunther (1981)
452 U.S. 161

Description

This was an action for damages and backpay. The state of Oregon statutorily directed that female prisoners should be guarded by female guards. Washington County employed four female guards. On February 1, 1973, female guards were paid between $525-668; male guards were paid from $701-940 per month in the same jail. In January 1974, the female section of the jail was closed, the prisoners transferred to the next county, and the female guards were discharged. Gender was conceded to be one occupational qualification. Male guards sometimes supervised more than ten times as many prisoners as did female guards; much of the work time of females was devoted to clerical duties. The district court found that the jobs were different, by sex, and there was no entitlement to additional pay, because pay was for different tasks under similar job titles.

Question and Answer

The question was narrowed to an analysis of the last sentence of the Civil Rights Act of 1964, Title VII: Does the failure of the female guards to satisfy the equal work standard of the Equal Pay Act preclude their proceeding against the government under Title VII? USSC: No, the respondents may proceed and try to get damages and backpay (5-4 decision).

Quarles v. McKenzie Public Schools (1982)
325 N.W. 2d 662 (ND)

Description

This was an action for reinstatement and salary recovery. Quarles taught in a three-teacher school and also acted as principal. She had advocated to the board for one additional teacher to the board. In 1980-81, she was paid $11,925; for the 1981-82 school year she was offered a contract of $10,000 and one teacher was added. There was no previous discussion of her reduced salary, nor of her reduced duties. North Dakota has a continuing contract law for teachers. Quarles did not return the proferred contract and the local board interpreted this as a refusal to accept. The board notified her that it was contemplating nonrenewal and she challenged their action as violative of the continuing contract law. That challenge was not resolved in hearings called by the board and attended by Quarles; it was appealed.

Question and Answer

Did the local board violate contract rights of Quarles? NDSC: No.

Conclusions

There is emerging a different view of teacher compensation in the American economy than prevailed during the 1960s and 1970s. The basic ingredient of that new view calls for departure from the single salary schedule for teachers, and adoption of pay plans that accommodate more than the traditional variables of longevity and academic advancement. Some such plans are beginning to be seen at local school district levels, providing for additional salary beyond some generally uniform base by payment for initiative, scholarship, innovation, excellence, multiple certification, and high priority teaching locations.

Advocacy for such differences is emerging from local, state, and federal sources. The titles of the programs, the amounts of money involved, and the procedures used to operate the plans vary, but they all share a common burden, i.e., each must be able to withstand a test for the violation of civil rights because the plans do not operate on the basis of equal pay to the same job, in a history of past practice. The plans, designed to do just the opposite, are susceptible of litigation.

Legislation indicates some limits that must be attended by any school considering such a plan. There is now a good history of judicial interpretation of much of that legislation. There are still some uncertain areas, such as are included in the theory of comparable worth. Setting aside any ethical questions, will the judiciary accept it as a reasonable interpretation of some civil rights legislation, saying that equality may be satisfied through comparability? If so, from an exclusively economic vantage point, will that be to the financial advantage of a group of teachers, or to the employing boards of education? It would allow conceptual flexibility to both groups.

There is a central question. Can a school district design and implement a variable pay plan for teachers that can survive the burden of proof in a civil rights suit? The answer is "Yes." The cases cited make it clear that there are limits to liability as well as limits to new opportunities for such plans. They cannot be haphazard or whimsical. They must address specifically some recognized educational problem and give fair promise (or proofs) of better instruction for children. This is the key. School boards, and their administrators, are responsible for the best instruction that they can reasonably afford. They are responsible for maintaining and improving that instructional quality within the confines of both state and federal laws. Actions that are taken and which may produce better instructional programs, and which have as one aspect--

even, a key aspect--a variable pay program, appear to be the kinds of actions that can withstand suits for the violation of civil rights. Any salary action by a board which is less than that will put a very difficult burden of proof upon that initiating board, should it be challenged in court.

Finally, three extra-legal comments seem necessary:

1. There is no pressing ethical reason why teachers should not be paid different amounts, on the basis of performance appraisal.
2. There are now available adequate, if less than perfect, systems for the appraisal of instructional performance.
3. There is no reason to expect that a differentiated pay system will provide relief for the instructional personnel part of the budget; probably, personnel costs will increase.

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